

MISSOURI COURT OF APPEALS WESTERN DISTRICT

KENNETH E. FIGGENS, SR., APPELLANT
vs.
STATE OF MISSOURI, RESPONDENT

DOCKET NUMBER WD77356

Date: June 23, 2015

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable Kathleen A. Forsyth, Judge

Appellate Judges:

Before Division Four: Alok Ahuja, C.J., Joseph M. Ellis, J. and Janet Sutton, Sp.J.

Attorneys:

Laura G. Martin, for Appellant

Gregory L. Barnes, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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Before Division Four Judges: Alok Ahuja, C.J., Joseph M. Ellis, J. and Janet Sutton, Sp. J.

On November 28, 2008, two armed men posing as law enforcement officers entered the apartment of Theresa Cox, held the individuals present in the apartment at gunpoint, and stole assorted property. Appellant was subsequently identified by multiple victims as one of the two robbers.

Appellant was charged in the Circuit Court of Jackson County with one count of burglary in the first degree, § 569.160; one count of robbery in the first degree, § 569.020; four counts of kidnapping, § 565.110; one count of assault in the third degree, § 565.070; and six counts of armed criminal action, § 571.015. Following a jury trial, the jury returned verdicts of guilty on ten counts, but acquitted Appellant on one of the kidnapping counts (alleging that he had confined Brandon Kenney for the purpose of committing first-degree robbery), the armed criminal action count associated with that kidnapping count, and the assault in the third degree count (alleging that he had knowingly caused offensive or provocative contact with Cox). At the request of defense counsel, the jury was polled. One juror, after initially stating that the guilty verdicts were her true verdicts, changed her answer to “no, honestly” and indicated that she had reasonable doubt. The court accepted the three not guilty verdicts and sent the jury back for further deliberations but the jury ended up hung on the remaining counts and the trial court declared a mistrial as to the ten remaining counts.

After the trial court denied a motion to dismiss the ten remaining counts on double jeopardy grounds, Appellant appeared and entered an Alford plea on the first degree robbery count. In exchange for his plea, the State agreed to dismiss all of the remaining counts and to recommend sentence of no more than twenty years imprisonment. The plea court subsequently sentenced Appellant to a term of fifteen years imprisonment. Appellant filed a motion for post-conviction relief under Rule 24.035 that was denied following an evidentiary hearing.

In his first point on appeal, Appellant contends that the motion court erred in denying his post-conviction motion because double jeopardy precluded the court from convicting and sentencing him on the robbery count. He argues that his acquittal on three counts by the jury served to preclude any further prosecution based upon collateral estoppel, asserting that the jury must necessarily have determined that his mistaken identity defense was valid and that someone else committed the crimes charged. In his second point, Appellant claims that the motion court erred in failing to find plea counsel ineffective for failing to make a double jeopardy objection based upon collateral estoppel at the plea hearing. Similarly, in his third point, Appellant contends that the motion court erred in failing to find sentencing counsel ineffective for failing to make a double jeopardy objection at the sentencing hearing.

AFFIRMED.

Division Four holds:

(1) In *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), the Supreme Court held that the federal rule of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy and applies to the states. As a general proposition, collateral estoppel bars relitigation of a specific fact or issue that was unambiguously determined by a previous jury. The defendant bears the burden of showing that his prior acquittal bars the present prosecution because the verdict there necessarily decided the issues now in litigation.

(2) At trial, Appellant did not concede that the charged events had occurred. In addition to challenging the credibility of the victim's identification, he also challenged the credibility of their testimony with regard to the various charged crimes having even been committed. He noted that multiple items of significant value had not been taken from the apartment and asserted that "real victims" of such crimes would not have behaved the way these victims had. He emphasized that Cox had taken a nap after the alleged incident, that none of the victims contacted the police that day, that there were inconsistencies in the victims' accounts, and that the apartment had been cleaned. In short, his defense was not limited solely to a claim of misidentification as argued on appeal.

(3) Appellant pleaded guilty to the first degree robbery count, which accused him of forcibly stealing specified items from Cox while he or another participant was armed with a deadly weapon. Determinations by the jury that Appellant did not assault Cox and did not unlawfully confine Kenney do not unambiguously preclude a finding that he robbed Cox. Because a rational jury could have grounded its acquittal verdicts upon an issue or issues other than that which the defendant would have sought to foreclose from consideration, collateral estoppel would not preclude the plea court from accepting Appellant's guilty plea on the robbery count.

(4) Because any double jeopardy objection would have been meritless, counsel cannot be deemed ineffective for failing to object on that basis at the plea hearing or sentencing hearing.

Opinion by Joseph M. Ellis, Judge

Date: June 23, 2015

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